

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWIGHT LAMAR BROOME,

Defendant-Appellant.

UNPUBLISHED

August 20, 2020

No. 348261

Oakland Circuit Court

LC No. 2017-264445-FH

Before: GLEICHER, P.J., and STEPHENS and CAMERON, JJ.

PER CURIAM.

Defendant, Dwight Lamar Broome, appeals his jury trial convictions of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), and possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b. Broome was sentenced to two years’ imprisonment for the felony-firearm conviction and was fined \$1,000 for possessing less than 25 grams of cocaine. We affirm.

I. BACKGROUND

On August 30, 2017, law enforcement executed a search warrant on a home on Michigan Avenue in Pontiac, Michigan, following an investigation relating to Broome’s sale of marijuana from the home. Detective Jerry Niedjelski, who was assigned to Oakland County Narcotics Enforcement Team, was involved in the execution of the search warrant. Detective Niedjelski testified that, as he approached the home’s front door, he saw Broome sitting on a couch with a loaded 40-caliber pistol within his reach. Law enforcement entered the home, and Detective Niedjelski secured Broome. Broome was searched, and a wallet was located on his person. The wallet contained cash, a concealed pistol license, a medical marijuana card, and a driver’s license. Broome’s cellular telephone was located and seized, and Broome told Detective Niedjelski that there was a gun on the couch, a gun by the refrigerator, and a gun in the dining room.

A digital scale, a box of sandwich bags, and a loaded 9-millimeter pistol were located in the dining room. A loaded shotgun was found by the refrigerator in the kitchen. When the remainder of the home was searched, law enforcement discovered a milk chute in a fully-enclosed “breezeway” between the house and garage. The milk chute, which was not accessible from

outside of the breezeway, was opened by law enforcement. A sandwich bag containing 8.79 grams of “off white, lumpy powder,” which was later determined to be cocaine, was located inside. According to Detective Niedjelski, although the milk chute itself was covered in dust and cobwebs, the bag was not. A digital scale was located in the garage, and it had white, powdery residue on its top. Five live marijuana plants were located in the basement, as were lights, a water filtration system, fans, and other materials for growing plants. Another live marijuana plant, marijuana wax, and seeds were located in different areas of the home. Additionally, several documents that tied Broome to the Michigan Avenue home were located and seized.

Broome was charged with possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), manufacturing with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii), and two counts of felony-firearm.

After the matter was bound over to the trial court following a preliminary examination, Broome filed a motion to disclose the confidential informant’s identity and to challenge the validity of the search warrant under *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978). Broome alleged that averments contained in the search warrant affidavit concerning his sale of marijuana to a “confidential informant” at the Michigan Avenue address on two separate occasions were false. Broome also contended that he never sold marijuana to anyone who was not one of his registered patients under the Michigan Medical Marijuana Act (“MMMA”), MCL 333.26421 *et seq.*, and he questioned whether the confidential informant mentioned in the affidavit even existed. Broome requested that the trial court “conduct an in camera of the confidential informant” and hold a *Franks* hearing. The prosecutor opposed the motion.

On October 3, 2018, the trial court held oral argument on the motion. During oral argument, defense counsel argued that, if the confidential informant was one of Broome’s medical marijuana patients, the transfers of marijuana would have been legal under the MMMA and there would not have been probable cause to issue the search warrant. After a discussion on the record, the trial court indicated that it would decide the motion after it determined whether Broome was immune from prosecution for the marijuana offense under MCL 333.26424, or whether he was entitled to an affirmative defense under MCL 333.26428. The hearing on those matters was scheduled for November 7, 2018. The trial court indicated that, if it was determined that Broome was not entitled to immunity or an affirmative defense under the MMMA, Broome would not be able to argue that transfers of marijuana to the confidential informant were legal.

On November 7, 2018, the parties appeared before the trial court for the scheduled hearing. At the beginning of the hearing, the prosecutor moved to dismiss the marijuana charge and the accompanying felony-firearm charge. However, the prosecutor specified that the dismissal of the charges was not a concession that Broome was entitled to immunity or an affirmative defense under the MMMA.

The trial court then revisited Broome’s request for a *Franks* hearing and his motion to disclose the confidential informant’s identity. The trial court offered to compare, *in camera*, a list of patient names provided by Broome with the confidential informant’s name provided by the

prosecutor.¹ Defense counsel stated that he had been unable to obtain a formal list of Broome's registered patients because the Michigan Department of Licensing and Regulatory Affairs ("LARA") would not release them. Although the trial court stated that LARA certification could occur after it determined whether any of the names provided by Broome matched the confidential informant's name, defense counsel stated, "I don't want to disclose people's private information I'm just thinking as we're going along, this isn't something that I'm prepared to discuss at this time." When asked what evidence supported Broome's request for a *Franks* hearing, defense counsel indicated that it was difficult to provide that information to the court without first knowing whether the confidential informant was Broome's patient. The trial court stated on the record that it would not hold a *Franks* hearing until it received a list of Broome's patients. The trial court held the matter in abeyance and entered an order, permitting Broome to issue LARA a subpoena for Broome's "patient [and] caregiver information."

Two months later, on the first day of trial, defense counsel informed the trial court that LARA had provided a list of Broome's registered patients with the patients' names redacted. Defense counsel requested further "[c]ourt intervention" to compel LARA to release the names. The trial court stated, "[T]here was nothing preventing you or [Broome] from inquiring of those patients, whose identity he knows, to ask them were you a confidential informant or not [W]hy not start there rather than start at LARA?" Defense counsel stated that Broome had spoken to his patients, but none of them had "indicated whether they were his [confidential informant] or not." He argued that the situation was "basically a catch-22 for the defense" because the trial court was requiring Broome to disclose the identity of the confidential informant in order to make the showing required to reveal the confidential informant's identity. The trial court responded, "[Y]ou can have [the confidential informant's identity] if you can show some tendency that it would show some relevance." After finding that Broome failed to do so, the trial court denied his motion to produce the confidential informant and his motion for a *Franks* hearing. Trial then commenced.

At trial, Detective Niedjelski testified that digital scales, sandwich bags, two pistols, a shotgun, and cocaine were located in Broome's home on August 30, 2017. However, Detective Niedjelski acknowledged that the bags and scales could have been used for medical marijuana. Text messages between Broome and two other individuals were read into evidence at trial. Detective Niedjelski opined that the content of the text messages supported that Broome sold cocaine to the two individuals.

Broome's defense at trial was that he did not know the cocaine was in the home and that he did not sell cocaine. Defense counsel elicited evidence that Broome's girlfriend also lived in the Michigan Avenue home and that a casino rewards card bearing her name was found in the dining room. Additionally, the two individuals who exchanged the text messages with Broome were called as witnesses, and they denied that they had ever purchased cocaine from Broome. Broome also called his neighbor as a witness, and the neighbor testified that the cocaine belonged

¹ Although the prosecutor indicated that she did not have the confidential informant's name, the trial court noted that the prosecutor could likely "find that out by a phone call[.]"

to him. Specifically, the neighbor testified that he hid the cocaine in Broome's milk chute because law enforcement was frequently entering the home that the neighbor shared with his nephews.

Broome was acquitted of possession with intent to deliver cocaine, but was convicted of possession of less than 25 grams of cocaine and felony-firearm. He was sentenced to two years' imprisonment for the felony-firearm conviction and was fined \$1,000 for possessing less than 25 grams of cocaine. This appeal followed.

II. ANALYSIS

A. PRODUCTION OF THE CONFIDENTIAL INFORMANT

Broome argues that the trial court denied his due-process right to a fair trial by refusing to order production of the confidential informant referenced in the affidavit supporting the warrant to search the Michigan Avenue home. Specifically, Broome argues that, because the confidential informant was not produced, Broome was unable to effectively challenge the search warrant and the evidence that was seized as a result of the illegal search on his home was allowed to be used at trial.

Broome requested production of the confidential informant in the trial court, thereby preserving his argument that the trial court's refusal to order production of the informant violated his due-process right to a fair trial. See *People v Henry (After Remand)*, 305 Mich App 127, 152; 854 NW2d 114 (2014). "We review a trial court's decision whether to order production of a confidential informant for an abuse of discretion. *Id.* at 156. A trial court abuses its discretion when it "chooses an outcome that falls outside the range of principled outcomes." *Id.* (quotation marks and citation omitted).

"Generally, the people are not required to disclose the identity of confidential informants." *Id.* (quotation marks and citation omitted). "However, when a defendant demonstrates a possible need for the informant's testimony, a trial court shall order the informant produced and conduct an in camera hearing to determine if the informant could offer any testimony beneficial to the defense." *Id.* Specifically, the trial court must determine whether the testimony of the confidential informant "is relevant and helpful to the defense of [the] accused, or essential to a fair determination of a cause[.]" *People v Underwood*, 447 Mich 695, 707; 526 NW2d 903 (1994) (quotation marks and citation omitted). In making this determination, the trial court should consider " 'the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.' " *Henry (After Remand)*, 305 Mich App at 156, quoting *Underwood*, 447 Mich at 705.

We conclude that Broome failed to "demonstrate[] a possible need for the informant's testimony." See *Henry (After Remand)*, 305 Mich App at 156. In his motion, Broome claimed that "disclosure of the informant would substantively assist his defense by impeaching the credibility of his arrest." Specifically, Broome opined that, if the confidential informant was one of his patients, there was no probable cause to search the Michigan Avenue home. However, his motion was not accompanied by an affidavit or any other documentation.

Although Broome argues on appeal that the trial court "demand[ed] that any list of patients be certified by LARA," this argument is disingenuous. The trial court offered to compare, *in*

camera, an informal list of patient names with the confidential informant's name to determine whether Broome's argument had factual merit. In response, defense counsel informed the trial court that he was uncomfortable with providing the court the names of Broome's patients. The motion was held in abeyance for defense counsel to "report back," and the trial court entered an order allowing defense counsel to issue a subpoena to LARA for Broome's MMMA patient and caregiver records. When the matter was revisited on the first day of trial, defense counsel reported that LARA had provided a list but had redacted the patients' personal information. When the trial court inquired as to why defense counsel insisted on procuring the names from LARA when other methods were available, defense counsel merely indicated that Broome had spoken to his patients and that the conversations had been inconclusive. Defense counsel did not explain below, and Broome does not explain on appeal, why it would have been unlawful or unworkable to provide the trial court with an informal list of patient names. If any of the names provided by Broome matched the confidential informant's name, the trial court could have then ordered production of the confidential informant for an *in camera* hearing to determine whether the informant's privilege should yield to Broome's need for the confidential informant's identity. As the trial court stated, this procedure could have been conducted without involving LARA. Thus, by failing to provide the informal list of names to the trial court so that the court could compare the list with the name of the confidential informant, Broome failed to "demonstrate[] a possible need for the informant's testimony." See *Henry (After Remand)*, 305 Mich App at 156.

Furthermore, even if the confidential informant was one of Broome's patients, Broome's challenge of the search warrant would have been unsuccessful. The United States and Michigan Constitutions require search warrants to be supported by probable cause. US Const, Am IV; Const 1963, art. 1, § 11. Probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *People v Franklin*, 500 Mich 92, 101; 894 NW2d 561 (2017) (quotation marks and citation omitted).

As relevant to this appeal, in *People v Brown*, 297 Mich App 670, 677; 825 NW2d 91 (2012), this Court held

to establish probable cause, a search-warrant affidavit need not provide facts from which a magistrate could conclude that a suspect's marijuana-related activities are specifically not legal under the MMMA. Probable cause exists if there is a substantial basis for inferring a fair probability that contraband or evidence of a crime exists in the stated place.

However, the *Brown* panel qualified that statement of law by noting:

While we decline, in light of the pertinent case law, to impose an affirmative duty on the police to obtain information pertaining to a person's noncompliance with the MMMA before seeking a search warrant for marijuana, if the police do have clear and uncontroverted evidence that a person is in full compliance with the MMMA, this evidence must be included as part of the affidavit because such a situation would not justify the issuance of a warrant. This scheme will reduce any potential (however unlikely) for police overreach in attempting to obtain search warrants. [*Id.* at 677 n 5.]

In this case, there is no evidence that police had “clear and uncontroverted evidence” that Broome was in full compliance with the MMMA when they sought and executed the search warrant. Indeed, at the preliminary examination, Detective Niedjelski testified that, at the time he sought the search warrant, he had not conducted any inquiry into Broome’s status under the MMMA, and he did not know that Broome had a medical marijuana card. Because *Brown* makes it clear that Detective Niedjelski did not have an affirmative duty to determine whether Broome’s marijuana sales to the confidential informant were legal under the MMMA before seeking a search warrant, we fail to see how production of the confidential informant would have benefitted Broome’s defense. See *id.* Consequently, Broome is not entitled to the relief he seeks.

B. *BRADY*² VIOLATION

Broome also argues that the prosecutor’s failure to disclose the identity of the confidential informant constituted a violation of his right to disclosure of potentially exculpatory evidence in violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). “This Court reviews due process claims, such as allegations of a *Brady* violation, de novo.” *People v Dimambro*, 318 Mich App 204, 212; 897 NW2d 233 (2016) (quotation marks and citation omitted; alteration omitted).

To establish a *Brady* violation, a defendant must show that “(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) viewed in its totality, is material.” *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014). “Evidence is favorable to the defense when it is either exculpatory or impeaching.” *Id.* Under *Brady*, “[t]he prosecution’s failure to disclose exculpatory or material evidence in its possession constitutes a due process violation regardless of whether a defendant requested the evidence.” *Henry (After Remand)*, 305 Mich App at 157. However, “[u]ndisclosed evidence will be deemed material only if it could reasonably be taken to put the whole case in such different light as to undermine the confidence in the verdict.” *Id.* (quotation marks and citation omitted).

As previously discussed, Broome failed to offer any evidence illustrating how production of the confidential informant would have been relevant and helpful to his defense. Rather, Broome merely surmised that the confidential informant could have been one of his patients and declined the trial court’s invitation to present an informal list of his patients so that it could be reviewed, *in camera*, in concert with the name of the confidential informant. As such, Broome failed to provide proof that the confidential informant could have offered either material or favorable evidence. Furthermore, the prosecutor did not suppress the confidential informant’s identity. Rather, as noted by the trial court, the prosecutor was not in possession of the confidential informant’s name. Therefore, we conclude that the trial court did not err by determining that Broome failed to establish a *Brady* violation.

C. *FRANKS* HEARING

Broome argues that he was entitled to a *Franks* hearing because several pieces of material information were missing from the search warrant affidavit. Because Broome failed to raise this

² *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

argument before the trial court, the argument is unpreserved. Therefore, we apply the plain-error rule, which requires that “1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An error has affected a defendant’s substantial rights when there is “a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Id.* Moreover, “once a defendant satisfies these three requirements, . . . [r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence.” *Id.* at 763-764 (quotation marks and citation omitted; alteration in original). A defendant bears the burden of persuasion with respect to prejudice. *Id.* at 763.

An affidavit supporting a search warrant is presumed to be valid. *People v Martin*, 271 Mich App 280, 311; 721 NW2d 815 (2006), citing *Franks*, 438 US at 171.

[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and . . . the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant’s request. [*Franks*, 438 US at 155-156 (alteration in original).]

However, “[t]o mandate an evidentiary hearing, the challenger’s attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.” *Franks*, 438 US at 171. “The rule from *Franks* is also applicable to material omissions from affidavits.” *Martin*, 271 Mich App at 311.

Broome argues that Detective Niedjelski omitted information from the search warrant affidavit that was necessary to establish the confidential informant’s reliability. The portion of the affidavit with which Broome takes issue reads:

- m. That the affiant believes the informant to be credible and reliable for the following reasons
1. That the [confidential informant] was cooperating voluntarily.
 2. The affiant believes the [confidential informant] was/is telling the truth based on her/his own observations.
 3. That the [confidential informant]’s forthcoming statements indicating prior involvement in illegal narcotic purchases are against her/his personal interests.

However, Broome’s argument that paragraph m is insufficient to establish the confidential informant’s reliability effectually ignores paragraph n. In paragraph n, Detective Niedjelski averred, in detail, that he personally observed the confidential informant complete two controlled purchases of marijuana from Broome’s home, one of which was completed within 48 hours of

Detective Niedjelski signing the affidavit. Importantly, an informant's reliability and credibility are established where, as here, the confidential informant completed two controlled purchases of controlled substances from the defendant's residence within two weeks before the warrant was issued and the confidential informant made statements against his penal interest. See *People v Head*, 211 Mich App 205, 209; 535 NW2d 563 (1995).

Furthermore, Broome does not argue that Detective Niedjelski's statements regarding the controlled buys were false or reckless. Rather, he argues that Detective Niedjelski was required to include the amount of marijuana sold to the confidential informant because any amount under 2.5 ounces may have been legal under the MMMA. However, as stated before, Detective Niedjelski did not have an affirmative duty to discover whether the controlled buys were legal under the MMMA before seeking the search warrant. *Brown*, 297 Mich App at 677 n 5. Furthermore, Broome has not established that law enforcement had "clear and uncontroverted evidence of [Broome's] full compliance with the MMMA." See *id.* at 677. Rather, Detective Niedjelski testified that he did not know that Broome had a medical marijuana card before executing the search warrant. Absent an offer of proof tending to show that Detective Niedjelski had clear and uncontroverted evidence that Broome was in full compliance with the MMMA, Broome has failed to show a material omission in the affidavit and has not established that the trial court plainly erred by failing to hold a *Franks* hearing on this basis.

Broome also argues in a cursory manner that "the arguments presented to disclose the identity of the [confidential informant] clearly establishes the necessity of conducting a *Franks* hearing." However, as already stated, Broome failed to provide affidavits or documentary evidence to support the motion. Furthermore, it is clear from Broome's motion before the trial court and his brief before this Court that his request for disclosure of the confidential informant is for the purpose of cross-examining the confidential informant in order to find something with which he could challenge the veracity of the affidavit and the validity of the resulting search warrant. This is not a preliminary showing sufficient for a *Franks* hearing. See *Franks*, 438 US at 171 ("To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine."). Therefore, Broome is not entitled to the relief he seeks.

D. SUFFICIENCY OF THE EVIDENCE

Broome argues that the evidence was insufficient to establish that he knowingly possessed cocaine because the cocaine could have belonged to his girlfriend, who also lived at the Michigan Avenue address, and because his neighbor testified at trial that the cocaine belonged to him. We disagree.

We review de novo a challenge to the sufficiency of the evidence. *People v Bailey*, 310 Mich App 703, 713; 873 NW2d 855 (2015). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). "Questions regarding the weight of the evidence and credibility of witnesses are for the jury, and this Court must not interfere with that role" *People v Carll*,

322 Mich App 690, 696; 915 NW2d 387 (2018). This Court must make all reasonable inferences in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

"[T]he elements of simple possession are (1) that a defendant possessed a controlled substance, (2) that the defendant knew he or she possessed the controlled substance, and (3) the amount of the controlled substance, if applicable." *People v Robar*, 321 Mich App 106, 131; 910 NW2d 328 (2017). "A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance." *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002) (quotation marks and citation omitted).

In determining whether constructive possession exists, "[t]he essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). "Circumstantial evidence that a defendant had the exclusive control or dominion over property on which contraband narcotics are found is sufficient to establish that the defendant constructively possessed the drug." *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005). "Because it is difficult to prove an actor's state of mind, only minimal circumstantial evidence is required." *Id.*

When viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence to establish that Broome constructively and knowingly possessed the cocaine. Evidence at trial established that Broome was the only person in the home when law enforcement executed the search warrant and, therefore, he had dominion and control over the contents of the home. Broome, who was detained in the living room, told Detective Niedjelski that there was a gun in the dining room and a gun by the refrigerator. A loaded 9-millimeter pistol was located in the dining room. A loaded shotgun, which was not immediately visible to law enforcement, was located by the refrigerator in the kitchen. Thus, Broome was aware of the contents of the kitchen and dining room.

The cocaine was found in the milk chute, which was located in the breezeway off of the kitchen. Although the milk chute was covered in dust and cobwebs, the bag itself was not, which suggested that the bag had been recently placed there or had been cleaned. A digital scale covered in white, powdery residue was located in the garage, which was connected to the breezeway. Broome's dog was also found in the garage, thereby supporting that the garage had not been abandoned for a significant period of time. Additionally, several documents were seized from home, each of which contained Broome's name and listed his address as the Michigan Avenue address. Broome's cell phone also contained text messages which suggested that he was engaged in the sale of cocaine.

To the extent that Broome argues that the jury simply should not have believed the prosecutor's version of the events and should have concluded that the cocaine belonged to his girlfriend or his neighbor, this Court resolves all conflicts of the evidence in favor of the prosecution when the sufficiency of the evidence is challenged. *People v Harrison*, 283 Mich App 374, 377-378; 768 NW2d 98 (2009). We also do not second-guess jury determinations regarding

the weight of the evidence or the credibility of the witnesses.³ *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008). Thus, we defer to the jury's determination that Broome knowingly possessed the cocaine and conclude that the prosecutor presented sufficient evidence to support Broome's conviction of possession of cocaine.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens
/s/ Thomas C. Cameron

³ We note that the jury simply could have chosen not to believe the neighbor when he testified that the cocaine belonged to him. According to Detective Niedjelski, one gram of cocaine could cost between \$100 to \$120. Nonetheless, the neighbor testified that, despite an every-other-day cocaine habit, he forgot that he had placed over eight grams of cocaine in Broome's milk chute until November 2018. The neighbor also had difficulty remembering when he hid the cocaine in Broome's milk chute and did not come forward until a short period of time before trial. Detective Niedjelski testified that he interviewed the neighbor but did not find him to be a "viable suspect." The jury could have also determined that the neighbor and Broome jointly possessed the cocaine.